United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7287
75-7320

In The

United States Court of Appeals

For The Second Circuit

B

P/S

UNITED BANK LIMITED,

Plaintiff-Appellee-Appellant,

vs.

COSMIC INTERNATIONAL, INC.,

Defendant-Appellee.

JANATA BANK and AMIN JUTE MILLS, LTD.,

Plaintiffs-Appellants,

vs.

COSMIC INTERNATIONAL, INC. and IRVING TRUST COMPANY,

Defendants-Appellees.

SONALI BANK and NISHAT JUTE MILLS, LTD.,

Plaintiffs-Appellants,

vs.

IRVING TRUST COMPANY and COSMIC INTERNATIONAL, INC.,

Defendants-Appellees.

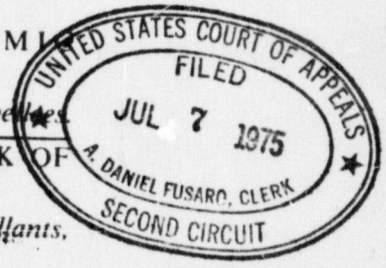
NISHAT JUTE MILLS, LTD. and NATIONAL BANK OF PAKISTAN,

Plaintiffs-Appellees-Appellants,

vs.

COSMIC INTERNATIONAL, INC.,

Defendant-Appellee.



BRIEF FOR PLAINTIFF-APPELLANT, JANATA BANK AND AMIN JUTE MILLS, LTD. AND SONALI BANK AND NISHAT JUTE MILLS, LTD.

NIERENBERG, ZEIF & WEINSTEIN
Attorneys for Plaintiffs-Appellants,
Janata Bank and Amin Jute Mills, Ltd. and
Sonali Bank and Nishat Jute Mills, Ltd.
230 Park Avenue
New York, New York 10017
OR 9-1455

TABLE OF CONTENTS.

-*-

TABLE OF CITATIONS

U.S. Constitution Cited

Federal Statutes Cited

Cases Cited

TABLE OF CITATIONS (Continued)

Cases Cited

TABLE OF CITATIONS (Continued)

Cases Cited

New York Statutes Cited

Articles Cited

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED BANK LIMITED,
Plaintiff-Appellee-Appellant,

-against-

COSMIC INTERNATIONAL, INC.,
Defendant-Appellee.

Docket No.
75- 7320

JANATA BANK and AMIN JUTE MILLS, LTD.,
Plaintiffs-Appellants,

-against-

COSMIC INTERNATIONAL, INC. and
IRVING TRUST COMPANY,
Defendants-Appellees.

SONALI BANK and NISHAT JUTE MILLS, LTD.,
Plaintiffs-Appellants,

-against-

IRVING TRUST COMPANY and COSMIC
INTERNATIONAL, INC.,
Defendants-Appellees.

Docket No.
75- 7287

NISHAT JUTE MILLS, LTD. and
NATIONAL BANK OF PAKISTAN,
Plaintiffs-Appellees-Appellants,

-against-

COSMIC INTERNATIONAL, INC.
Defendants-Appellees.

These cases, consolidated for appeal herein, involve conflicting claims to the proceeds of jute sold by Amin Jute Mills, Ltd. and Nishat Jute Mills, Ltd. (formerly known as Pak-Am, Inc.), an American importer.

Amin Jute Mills, Ltd. sold jute to Cosmic International Inc. for which Cosmic International, Inc. agreed to pay $433,365.96.

Nishat Jute Mills, Ltd. sold jute to Cosmic International, Inc. for which Cosmic International, Inc. agreed to pay $97,043.50. Against these sales Nishat and Amin drew large sums of money from NBP local office Dacca and UBL Chittagong and duly mortgaged the bills of exchange in favor of NBP Dacca and UBL Chittagong. These mortgages and documents evidencing these loans remain located at Dacca and Chittagong.

Following these sales by these Jute Mills located in the territory once known as East Pakistan and now known as Bangladesh, Bangladesh achieved its independence and a dispute arose as to who is entitled to the proceeds of these sales.

The District Court awarded the proceeds of these sales to the Pakistani plaintiffs (United Bank Limited and Nishat Jute Mills, Ltd. and National Bank of Pakistan) and held that the Bangladesh plaintiffs (Janata Bank and Amin Jute Mills, Ltd. and Sonali Bank and Nishat Jute Mills, Ltd.) were not entitled to the proceeds thereof.

This appeal on behalf of the Bangladesh plaintiffs seeks to reverse two final judgments entered below by Judge Brieant.

THE FACTS.

On April 10, 1971, the Nation of Bangladesh declared its independence from Pakistan effective March 26, 1971. Following such Declaration of Independence, a war ensued and the forces of Pakistan surrendered the territory now known as Bangladesh on December 16, 1971. No formal treaty has ever been signed terminating that war, although the Bangladesh Government released the prisoners of war which were captured during the War of Liberation.

Prior to that War of Liberation, United Bank Limited (UBL) had a branch office in Laldighi East, Chittagong, in the territory then known as East Pakistan and now known as Bangladesh.

The National Bank of Pakistan (NBP) is a banking company organized and existing under the laws of Pakistan pursuant to special ordinance. Prior to December 16, 1971, NBP had a local office for each of the three areas then constituting Pakistan located at Dacca, Lahore and Karachi. It also had approximately 255 branches and sub-branches in the Dacca area (now Bangladesh).

Both Amin Jute Mills, Ltd. and Nishat Jute Mills, Ltd. were incorporated under the Companies Act of Pakistan. Each of these Companies had their only jute mill in the territory formerly known as East Pakistan (now Bangladesh). The registered office of Amin was at all times in Chittagong within the territory now known as Bangladesh.

Subsequent to March 26, 1971, but before December 16, 1971, the Laldighi East branch of UBL allowed credit to Amin, which was secured by a lien on Amin's assets including manufactured jute in transit and its proceeds and the bills of exchange representing its proceeds. Amin's indebtedness to the Laldighi East branch of UBL, at all times relevant to this action, exceeded the total sums in issue in these cases.

Amin exported jute which it manufactured at its only mill at Chittagong in the territory now known as Bangladesh, to the United States of America, where it was purchased by Cosmic, the importer. The total price of this jute was $433,365.96. On or before the arrival of the jute, and to obtain the bills of lading and other documents necessary to remove the jute from the steamships carrying it, Cosmic executed seven Trust Receipts in favor of UBL Chittagong. In each instance the purchase price for the jute was to be paid within 180 days after the date of the Trust Receipt. These Trust Receipts were executed between August 11, 1971, and December 3, 1971, by Cosmic, and the monies due thereafter were payable between February 7, 1972, and May 31, 1972.

Nishat maintained an account with a branch of NBP located

at Dacca. Nishat borrowed monies from the Dacca Office of NBP and on December 16, 1971, Nishat owed NBP, Dacca, more than the amount of the claim involved in this lawsuit. This debt was also secured by a mortgage on Nishat's assets, including manufactured jute in transit and its proceeds, including the bills of exchange representing its proceeds, in favor of the local office of NBP at Dacca on December 29, 1971.

On February 28, 1972, an Order was promulgated by the People's Republic of Bangladesh which expropriated the property of citizens of any state at war with Bangladesh after March 25, 1971. By its terms, this Order, the "Bangladesh Abandoned Property (Control, Management and Disposal Order, 1972" included all property owned by Pakistanis, including banks and the Order defined property as including debts.

On March 26, 1972, two orders were promulgated by the Nation of Bangladesh. The Bangladesh Banks Nationalisation Order, 1972, created new banks including Janata Bank and Sonali Bank and placed in the hands of the newly

created banks the "undertaking" of the previously existing banks. By its terms, the undertaking was defined as follows:

> "(1) The undertaking of each existing bank shall be deemed to include all assets, rights, powers, authorities and privileges and all property, movable and immovable, cash balances, reserve funds, investments and all other rights and interests in, or arising out of, such property as were immediately before the commencement of this Order in the ownership, possession, power or control of the existing bank in relation to the undertaking within the territory of Bangladesh or in relation to the business of such undertaking outside Bangladesh, and all books of accounts, registers, records and all other documents of whatever nature relating thereto and shall also be deemed to include all borrowings, liabilities and obligations of whatever kind then subsisting of the existing bank in relation to the undertaking within the territory of Bangladesh." [1]

---

[1] On its Page 5 of its Opinion (A. 23) the Court below stated that this Order nationalized the shares of banks which had not already been vested in the Government. This statement is completely contradictory to the evidence before the Court which had copies of the Order before it. By its terms, this Order nationalized assets of the Bank, not the shares of the Bank.

On the same day, the Bangladesh Industrial Enterprises (Nationalization) Order, 1972 was promulgated which decreed that all of the shares of various industrial enterprises, including Amin Jute Mills, Ltd. and Nishat Jute Mills, Ltd. not already vested in the Government shall immediately be vested in the Government of Bangladesh and that control of these jute mills was placed in the hands of a newly created Government owned corporation known as Bangladesh Jute Mills Corporation.

The United States Government has granted official recognition to the Government of Bangladesh on April 4, 1972.

Cosmic continues to purchase jute products from the mills located in the People's Republic of Bangladesh. During the period of approximately May 30, 1971 to June 16, 1971, Mr. S.D. Keen, the President of Cosmic, was present in the territory now known as Bangladesh, in order to expedite shipments of jute orders placed with mills in that region. From approximately March 1, 1972 to March 31, 1972, one Joel M. Allen, who was then

a vice-president of Cosmic, was present in Bangladesh to familiarize Cosmic with current status of the jute carpet backing industry in that area, and to expedite orders previously placed by Cosmic.

On February 22, 1974, Pakistan recognized the People's Republic of Bangladesh as a sovereign nation.

Both Pakistan and the People's Republic of Bangladesh have adopted constitutional provisions which in substance provide that in the event of a Governmental taking of any property, the adequacy of any compensation paid shall not be called into question by any court of law.

ARGUMENT.

POINT I.

THE DISTRICT COURT ERRED IN ITS FINDING THAT THE BANGLADESH BANKS NATIONALIZATION ORDER OF 1972 MAY NOT REACH THE DEBTS OF COSMIC INTERNATIONAL, INC. TO PAKISTANI BANKS.

On Page 13 of its decision (A 3.) the District Court stated:

"It is not clear that this Order would be interpreted by a Bangladesh court to reach debts of Cosmic to the Pakistani banks. Asrarul Hossain, Esq., a prominent Bangladesh lawyer called by the Bangladesh plaintiffs as an expert on the law of Pakistan and Bangladesh, testified that property within the reach of the above-quoted paragraph had to be "present" in Bangladesh at the time the banks were nationalized (Tr. p. 71). Mr. Hossain was not asked whether a Bangladesh court would consider a debt payable in the United States to be 'present' in Bangladesh."

The Court ignored the fact, however, that by its terms the Bangladesh Banks Nationalization Order of 1972 transferred the "undertaking" of the existing banks to the newly created banks and defined the "undertaking" as including property "within the territory of Bangladesh ... or outside Bangladesh".

To determine if the claims against Cosmic International, Inc. were includable within the Banks Nationalisation Order, it was not necessary for the Court or the witnesses to consider whether the claims were located inside Bangladesh or outside of that country. There is no doubt by the language of that Order that it attempted to vest claims located outside the territory of Bangladesh in the newly created banks. The Bangladesh plaintiffs produced expert testimony on the trial hereof with regard to what was taken by the Bangladesh Banks Nationalisation Order of 1972 under Bangali law. Mr. Asrarul Hossain (an eminent lawyer from that territory and formerly Attorney

General under the Pakistani Regime in that territory) was asked the following:

> "Q Could you express an opinion with a reasonable degree of certainty under the laws of Bangladesh as to whether that Bangladesh Banks Nationalisation Order transferred to the new banks created thereunder the claims which are the subject matter of these actions?
>
> A Well, the schedule is in English and it's clearly stated in Section 7 that on the taking outside Bangladesh would also be transferred -- which arises in Bangladesh would also be transferred to the assets of the new banks constituted out of the old banks; and they have taken of the position of the extra territorial operations and they have said that if the laws of any other country requires some provision to be taken and then steps have been authorized, the chief executive officer has been authorized to take all such steps as may be required by the laws of any such country outside Bangladesh for the purpose of effecting such transfer or vesting in the new banks.
>
> Q Is your answer to the foregoing question in the affirmative?
>
> A I beg your pardon?
>
> Q Is your answer to the foregoing question in the affirmative?
>
> A Yes. I started it with an affirmative."

(A. 313)

Thus, there is little question that the terms of the Bangladesh Banks Nationalisation Order 1972 included the debts against Cosmic International, Inc.

POINT II.

THE ACT OF STATE DOCTRINE PRECLUDES THE COURTS HERE FROM LOOKING INTO THE VALIDITY OF THE TAKING BY THE SOVEREIGN NATION OF BANGLADESH.

In framing the United States Constitution, the Fathers of our Country established not only a series of checks and balances, but differentiated between the powers and duties of the three branches of Government. Control over foreign affairs was vested in the Executive, subject to appropriate checks and balances placed in the hands of Congress. Thus, under Article II, Section 2, of the Constitution, the President is the Commander-in-Chief of the Army and Navy, and he may make treaties with the advice and consent of two-thirds of the Senate, and he may nominate and appoint ambassadors. Under Article II, Section 3, the President has the sole and exclusive power to receive Ambassadors and other public ministers. The reign of the President over foreign affairs is controlled, however, by the powers expressly granted to Congress under Article I, Section 8. These powers include to provide for the common defence (sic.), to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, to declare war, to raise and support armies, to provide and maintain a navy, to make rules for calling forth the militia, and to provide the organizing, arming and disciplining the militia.

The Courts, however, were given only a limited power over foreign affairs. Article III, Section 2, provides that the judicial power is to extend to cases between a State or the Citizens thereof, and Foreign States, Citizens or Subjects. This is the only powers over foreign affairs expressly given to the judiciary by our Constitution.

Early in our juridical history, the Courts evolved the important notion that there were some cases involving foreign sovereigns and the acts of Sovereigns which the Courts should abstain from passing judgment upon. In The Schooner Exchange vs. M'Faddon, 11 U.S. (7 Cranch) 116, (1812), Chief Justice Marshall stated:

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."

This case is generally said to have spawned the two correlative doctrines of Sovereign Immunity and Act of State.

In Underhill v. Hernandez, 168 U.S.250, 42 L.Ed. 456, 18 S. Ct. 83 (1897), the Court held that the Courts of the United States will not sit in judgment of acts done by another

nation. Also see: American Banana Co. v. United Fruit Co., 213 U.S. 347, 53 L.Ed. 826, 29 S. Ct. 511 (1908); Oetjen v. Central Leather Co., 246 U.S. 297, 62 L.Ed. 736, 38 S. Ct.309 (1918); Ricaud v. American Metal Co., 246 U.S. 304, 62 L.Ed. 733, 38 S. Ct. 312 (1918); United States v. Belmont, 301 U.S. 324, 81 L.Ed. 1134, 57 S. Ct. 758 (1937); United States v. Pink, 315 U.S. 203, 86 L.Ed. 796, 62 S. Ct. 552 (1942).

The decision in Underhill was reiterated in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 86 L.Ed. 796, 62 S. Ct. 552 (1963), where the Court said, at page 428:

> "...The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government extant and recognized by this country at the time of the suit in the absence of a treaty or other unambiguous agreement regarding controling leading principles, even if the complaint alleges that the taking violates customary international law."

The "taking" by the Government of the People's Republic of Bangladesh in the case at bar was obviously by a foreign sovereign government which was "extant and recognized by this country at the time of the suit". No one has signed a treaty or other unambiguous agreement precluding such "taking". Judge Brieant found, however, that the thing that was taken, i.e. the claim of the banks against Cosmic International, Inc., was not within the territory of Bangladesh.

(A) THE DEBT OF COSMIC INTERNATIONAL, INC. IS LOCATED IN BANGLADESH BECAUSE THE CREDITORS ARE THERE.

In U.S. v. Belmont,[2] supra, a Russian corporation had deposited money with a private bank in New York. After the Czar was overthrown, the Soviet Government decreed the liquidation of the Russian corporation and nationalized and expropriated its assets. When the United States recognized the then revolutionary government in Russia, an agreement was entered into between the Foreign Minister of the Soviet Government and officials of the United States State Department, by which these expropriated assets in the United States were relinquished and ceded to the United States Government. Notwithstanding the fact that the debtor was a New York bank at the time the Court held in the Belmont Case that the United States had thus acquired title to these assets, even though the title so derived passed through the Soviet Government's expropriation.

---

[2]An attempt has been made to distinguish the Belmont and Pink cases on the ground that the Litvinov Assignment constituted a "treaty" between our country and the U.S.S.R. There is nothing to indicate that there was any treaty ratified by the Senate and in fact the opposite is true. It is difficult to envision how an agreement between the executive branch of our government to recognize the Soviet Regime in Russia in consideration of an assignment of certain claims to the United States could deprive the former owners of those claims of their property rights in those claims. Even if there were a treaty between the United States and Russia, such a treaty would probably be unconstitutional as the treaty making power has been limited by the Fifth Amendment.

In the Belmont Case, for purposes of the Act of State Doctrine, the debt was decreed to be located where the creditor was, rather than where the debtor was located. Similarly, in U.S. v. Pink[3], supra, a Russian insurance company had a branch in New York and deposited certain assets with the Superintendent of Insurance of the State of New York to secure its obligations under policies issued to residents of New York State. This insurance company was also nationalized during the Russian Revolution and the claims to the fund remaining in the hands of the New York State Superintendent of Insurance was also assigned to the United States by that agreement between the Foreign Minister of the Soviet Union and the United States of America. Again the Court found that the United States had title. Implicit in the Court's determination was a determination that the debt, for purposes of the Act of State Doctrine, was located in the Soviet Union where the creditor was located, rather than in the State of New York, where the "debtor" (i.e. Superintendent of Insurance) was located.

It is axiomatic that an assignee cannot acquire by reason of an assignment more rights than the assignor possessed.

Nevertheless, in two decisions relied upon by Judge Brieant, this Court cast some doubt upon the location

---

[3]Ibid.

of an intangible debt for purposes of the Act of State Doctrine.

In Republic of Iraq v. First National City Bank, 353 F. 2d 47, (C.A. 2, 1965), the Court was faced with the question of determining who was entitled to certain bank deposits which formerly had belonged to King Faisal II of Iraq. When the King was killed by a revolutionary regime that usurped power in Iraq, the new regime decreed that all property of the King be confiscated. Accordingly, the Republic of Iraq sued in the United States District Court for the Southern District of New York to recover the bank deposit it claimed to have confiscated. The Court located the debt in the United States of America, and stated on page 51:

> "In this case, neither the bank account nor the shares of Canadian Investment Trust can realistically be considered as being within Iraq, simply because King Faisal resided and was physically present there at the time of his death; in the absence of any showing that Irving Trust had an office in Iraq, or would be in any way answerable to its Courts, we need not consider whether the conclusion would differ if it did." (Emphasis supplied.)

The Republic of Iraq Case could have been limited to its own peculiar facts. A bank account is a peculiar type of debt, whose situs may differ from other kinds of debts. It is not payable any place the debtor may be found or wherever the debt may be enforced but only at the branch of the banks in which the deposit

was made. The English House of Lords made the distinction in Arab Bank Ltd. v. Barclays Bank [1954] A.C. 495.

Nevertheless in Menendez v. Saks & Co., 485 F. 2d 1355 (C.A. 2, 1973)[4], this Court extended its decision in Republic of Iraq to cover debts other than bank deposits. In the Menendez case, the question was whether a debt owing by an importer in the United States of America was vested in the former owners of a Cuban cigar factory, or an "interventor" to whom this claim has been assigned by Cuban Law. The Court held that the debt was not reached by the Cuban law,

---

[4]Cert. granted sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 40 L.Ed. 2d 758, 94 S.Ct. 2382 (1974). The Supreme Court, in granting certiorari requested certain issues be briefed in full by the parties. The issues requested to be briefed by the Supreme Court do not consider the question of where a debt is located for purposes of Act of State Doctrine, although a petition for certiorari which would have raised this question directly was presented to the Supreme Court. The Supreme Court has not ruled in that petition for certiorari, but has granted another petition for certiorari in the same case, leaving the question of whether the petition which would have raised the question of location of the debt is Act of State Doctrine sub judice. One of the questions on which the Court has requested briefs from counsel is whether there should be an exception to the Act of State Doctrine if the question is raised in a counterclaim rather than in a direct claim by palintiffs. This was an issue which the Court failed to agree upon in First National City Bank v. Banco National de Cuba, 406 U.S.759, 32 L.Ed. 2d 466, 96 S.Ct.1808 (1972). We do not believe that there should be an exception to the Act of State Doctrine based upon how the issue is raised procedurally. In fact, we note that in the First National City Bank Case, five justices (Brennan,Stewart,Marshall,Blackmun and Powell,JJ)rejected the notion of a counterclaim exception, and only one, Mr. Justice Douglas, espoused the position of such an exception. The other three justices (Burger,C.J., and White and Rehnquist,JJ) did not raise that question. Even if there were an exception for counterclaims, the issue here is not being raised by counterclaim, and the exception would not be relevant. On June 16, 1975, the Supreme Court restored the case of Alfred Dunhill of London, Inc. v. Republic of Cuba to its calendar for reargument and requested counsel to brief and discuss all questions presented by this case, including whether the Sabbatino case, supra, should be reconsidered.

because, for purposes of the Act of State Doctrine, a debt is not located within the taking state unless that state has the power to enforce that debt. In Menendez, the Court noted, on page 1364:

> "For purposes of the Act of State Doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it."

On page 1365, the Court noted:

> "In the absence of any showing that the importers or their agents were present in Cuba or subject to the jurisdiction of the Cuban courts at the time of the intervention, we are persuaded by the reasoning of the Republic of Iraq that no legal effect should be accorded to Cuba's purported confiscation of the importers' debts to the owners." (Emphasis supplied.)

In our view, the Belmont and Pink cases, supra, should have required this Court to reach different results in Republic of Iraq, supra, and in Menendez, supra. The rationale for such a reasoning, besides relying upon the decisions of the Supreme Court of the United States is buttressed by common sense. A sovereign nation has the right to deprive those within its territory of their property.

When an intangible such as a debt is taken by a sovereign nation, the debtor does not lose anything. He

remains indebted as he was before the taking. His rights are not affected by the taking. The location of the debtor, therefore, should be immaterial to determine whether a taking was effected or the validity of that taking.

On the other hand, when a debt is taken, it is the creditor who previously owned the debt who is deprived of the right to collect it. We submit that only when the creditor is in the taking nation can a debt be taken. Therefore, it is the location of the creditor and not the debtor which should determine the location of a debt for purposes of the Act of State Doctrine. If that is so, Belmont and Pink were correctly decided and Republic of Iraq and Menendez were incorrectly decided.

(2) THE DEBT IS LOCATED IN BANGLADESH BECAUSE THE COURTS THERE HAVE JURISDICTION TO ENFORCE IT.

This Court, however, need not reverse itself in Republic of Iraq and Menendez in order to reverse Judge Brieant in the instant case.

As we have already shown, in each of the latter two cases this Court took great pains to point out that the

debtor was not amenable to jurisdiction in the taking state and implied that the result would have been different if it was. Judge Brieant dismissed these statements as dicta.

The Court of Appeals of New York recently decided the case of J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Limited, _____ N.Y. _____, _____ N.Y.S. 2d _____ (June 16, 1975). Relying on Menendez, that Court stated: "The doctrine is not applicable here since a deb is not 'located' within a foreign state unless that state has the power to enforce or collect it."

JURISDICTION OF THE COURTS OF BANGLADESH

In the case at bar, two attorneys testified that the Code of Civil Procedure effective in Bangladesh allows its Courts to take jurisdiction over any cause of action if any one of four factors should be present. These four factors are enumerated in Section 20 of the Bangladesh Code of Civil Procedure.

Mr. Hossain testified that the Courts of Bangladesh will assume jurisdiction if the cause of action or part of it arose in Bangladesh, or the defendant resides and/or carries on business there, or if he "acquiesces into the jurisdiction". (A. 309 - 310). He further testified that in his opinion all or part of the causes of action against Cosmic arose in the territory of Bangladesh within the meaning of Section 20, subdivision (c) of the Code of Civil Procedure, and therefore the Courts of Bangladesh did have jurisdiction if an action were commenced there to recover the purchase price of this jute. Mr. Hossain's opinion was reinforced by the testimony of Mr. Huq.

Mr. Haider Mota, who came from Pakistan, agreed with Mr. Hossain's opinion that these causes of action arose in Bangladesh. Relying solely on two decisions which were rendered by the Courts in Pakistan, Mr. Haider Mota questioned the opinion of Messrs. Hossain and Huq that the Courts in Bangladesh can take jurisdiction of a case if the cause of action arose there.

One case that Mr. Haider Mota referred to was decided by the Supreme Court of Pakistan and was entitled

"Rahmania Trading Company v. Eagle Star Insurance Company". (A. 403). Referring to that case, Mr. Haider Mota admitted that the Court did not pass upon the question of whether jurisdiction could be obtained over a non-resident who had no place of business in the territory if the cause of action or part of it arose therein. Indeed, the decision in that case expressly states that no part of the cause of action arose within the territory of Chittagong, and that the Court was not passing upon the issue of whether jurisdiction could be obtained under Section 20, subdivision (c) of the Code of Civil Procedure. Admittedly, then, the Eagle Star case referred to by Mr. Haider Mota was not in point.

Another case referred to by Mr. Haider Mota was the Bubna More case. (A. 407). This case was not decided by the Supreme Court of Pakistan, but rather was decided by an intermediate Appellate Court, known as the High Court. On cross-examination, Mr. Haider Mota was forced to admit that the Court dismissed the plaint[5] in the Bubna More case because no summons or writ had been served on the defendant.

Obviously, for the Court to acquire jurisdiction, the

---

[5] In the practice on the Indian sub-continent, what we refer to as the complaint, the first pleading in the action, is generally known as the "plaint".

defendant must be given notice of a lawsuit being brought against it, and the failure to serve the defendant in the Bubna More case was fatal. This does not necessarily mean, however, that if the writ were properly served on the defendant, and they were given notice, the Court would not acquire jurisdiction. Furthermore, it should be noted that Mr. Haider Mota admitted that in the entire decision of the Court, there was not even one mention of §20 of the Code of Civil Procedure in the Bubna More case. (A.347). Reference to that section was only in the head note which was not written by the Court, but by the Reporter. (A. 347).

Mr. Haider Mota admitted that part of the causes of action against Cosmic in the instant litigation arose within the territory of Bangladesh within the meaning of Section 20, subdivision (c) of their Code of Civil Procedure (A.343).

The opinions expressed by the Bangladesh plaintiffs' witnesses, Messrs. Hossain and Huq, that the Court could acquire jurisdiction over these causes of action against Cosmic, was amply asserted by the clear language of the Statute and the official examples in the Statute. Therefore, this Court has clear and convincing evidence before it to the effect that Cosmic could have been sued in Bangladesh on the debts involved in this litigation.

If the Bangladesh Code of Civil Procedure provisions were not sufficient to confer jurisdiction, the Stipulations of Fact would be sufficient to confer jurisdiction on the Courts of Bangladesh. The parties have stipulated in each case that high officers of Cosmic were personally present in the territory of Bangladesh after the Nationalisation Decree to further the business interests of Cosmic in that country.[6] Furthermore, it has been stipulated that Cosmic continues to purchase goods in Bangladesh f.o.b. ports in Bangladesh, which would give it a property right in the jute it purchased lying in the ports, which would be subject to an in rem or quasi in rem attachment. For these reasons, the Courts in Bangladesh would have jurisdiction over these causes of action.

IF THE COURTS IN BANGLADESH ASSUME JURISDICTION OVER THESE CAUSES OF ACTION, THEIR JUDGMENT WOULD BE RECOGNIZED AND ENFORCED IN THE COURTS OF THE UNITED STATES.

Had an action been brought against Cosmic in Bangladesh, and judgment or decree rendered there, either against or in favor of Cosmic, the Courts of the United States, and particularly the Federal Courts sitting in New York, would be bound to enforce

---

[6] UBL Stipulation ¶6, Somali Stipulation ¶22 (A. 49; A. 144)

such a judgment or decree. We recognize, of course, that there is nothing in the United States Constitution which obligates the Courts in the United States to enforce judgments of foreign nations as the full faith and credit clause obligates one state to enforce the judgments and decrees of a sister state. Nevertheless, under the doctrine of comity of nations, it is clear that such a recognition and enforcement would be accorded to a judgment of the Bangladesh Courts. It is not clear whether Federal or State law governs the recognition of foreign judgments. The conduct of foreign affairs is vested by the Constitution of the United States in the Federal Government alone and the United States Supreme Court has yet to decide whether the right to conduct foreign affairs precludes the individual states from establishing their own rules as to whether to recognize a judgment or decree of a foreign nation.[7]

Nevertheless, whether State law or Federal law is to be applied, we believe the results would be the same. In Hilton v. Guyot, 159 U.S.113, 40 L.Ed.95, 16 S.Ct. 139 (1895), the Supreme

---

[7] See e.g. Homburger, Comment, Judgments Rendered Abroad, State Law or Federal Law, 12 VIII. L. Rev. 618; Peterson, Foreign Country Judgments and the Second Restatement of Conflict of Laws, 72 Columbia Law Rev. 220.

Court of the United States held that where there has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction, after due citation or voluntary appearance of the defendant, and there is nothing to show prejudice in the Court, or other misbehavior in obtaining the judgment, the merits of the cause should not be tried again on the mere assertion of the losing party that the judgment was erroneous. The Courts in the State of New York, like the Supreme Court of the United States in Hilton, supra, will afford recognition to a foreign judgment or decree rendered by a Court which acquired jurisdiction over the defendant. Indeed, the Courts of the State of New York have decided that the law in New York is even more liberal than Hilton v. Guyot, supra, in the recognition of judgment rendered by foreign countries. In Johnston v.Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926), New York's Court of Appeals held that judgments rendered abroad are conclusive on the merits and not merely prima facie evidence of the judgment of the award made by the foreign tribunal. If a judgment of the Courts of Bangladesh is to be accorded recognition either as conclusive of the determination made therein, or as prima facie evidence of the determination made therein, the Courts of Bangladesh must have acquired jurisdiction. Obviously, there is usually a question of fact for determination on a trial as to

whether the foreign court did obtain jurisdiction. Wilkinson & Co., Ltd. v. Calvine Mills, Inc., 28 A.D. 2d 675, 282 N.Y.S. 2d 655, (First Dept. 1967); Plugmay Ltd. v. National Dynamics Corp., 53 Misc. 2d 451, 278 N.Y.S.2d 896, Affirmed 282 N.Y.S.2d 172. New York has adopted the Uniform Foreign Money Judgments Recognition Act.[8] This statute merely attempts to codify the existing common law.

In the case at bar we have had a full and complete trial of whether the Bangladesh Courts could acquire jurisdiction of these causes of action against Cosmic. There is no issue of fact remaining to be heard, because those issues have indeed been heard.

The only remaining question is whether the jurisdiction acquired by the Bangladesh Courts would be consistent with our concepts of due process. If it were not consistent with our concepts of due process, we would not recognize or enforce the judgment of the Bangladesh Courts. Compagrie du Port de Rio de Janeiro v. Mead Morris Manufacturing Co., 19 F. 2d 163 (1927). Consistency with our standards of due process will allow the Courts here to enforce the judgment here. Those standards of due process have recently been expanded by the Supreme Court and even those

---

[8] New York CPLR 5301 - 5309.

expanded concepts would enable the Courts here to enforce a foreign judgment.[9]

The determination of whether the jurisdiction of the Bangladesh Courts over these causes of action against Cosmic would be consistent with our notions of due process is determined by looking at the history and development of our concept of due process with regard to extra-territorial jurisdiction of the courts. We submit that our notion of due process with regard to extra-territorial jurisdiction of courts is based upon the reasonableness of the foreseeability of forum consequences. In Hanson v. Denckla, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S. Ct. 1228 (1958), the Court held that Florida, the domicile of a decedent, could not obtain in personam jurisdiction over a Delaware trustee of an inter vivos trust created by the decedent when he lived in Pennsylvania.

In Hanson, the Court observed: "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that state that are a prerequisite to its exercise of power over

[9] Von Mehren & Patterson, "Recognition and Enforcement of Foreign Country Judgments in the UnitedStates", published in Law & Policy in International Business Vol. 6 No. 1, 1974 by Georgetown University Law Center, Page 37.

him. See International Shoe Co. v. Washington, 326 U.S. 310, 319.**** The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of law."

Although the Supreme Court has spoken in such vague terms in this area as "fair play and substantial justice" and "invoking the benefits and protections" of the law of the forum state, the cases decided by the Supreme Court fall into a particular pattern. Each time the non-resident defendant performed some act which would reasonably result in foreseeable forum consequences, jurisdiction was upheld. When forum consequences were not foreseeable, the Supreme Court held that jurisdiction could not be invoked.

In International Shoe v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), the defendant systematically employed salesmen in Washington; consequences in Washington were reasonably foreseeable. The Supreme Court upheld the power of the Washington Courts to assert in personam jurisdiction.

In McGee v. International Life Insurance Company, 355 U.S. 220, 2 L.Ed 2d 223, 78 S.Ct. 199 (1957), an insurer

mailed a solicitation into California, as a result of which California consequences could be foreseen and the Supreme Court upheld the power of California to assert in personam jurisdiction. On the other hand, in Hanson v. Denckla, the defendant did nothing which would result in foreseeable consequences in Florida. It was entirely fortuitous that the settlor of the trust moved to Florida.

In Gray v. American Radiator & Standard Sanitary Corporation, 22 Ill. 2d 432, 172 N.E. 2d 761 (1961), a hot water heater exploded in Illinois injuring the plaintiff. The valve, which caused the explosion, was manufactured by an Ohio company. The Illinois Supreme Court found no constitutional infirmity in asserting jurisdiction over this Ohio manufacturer. Since it shipped its goods into Illinois, the Ohio manufacturer could reasonably have anticipated consequences of its improper manufacture to occur in Illinois; c.f. Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673.

In Taylor v. Portland Paramount Corp., 283 F. 2d 634 (1967), the Court found that it would be unconstitutional to permit the Oregon Court to assert jurisdiction over a well-known movie actress who, it was claimed, had "transacted business" in Oregon by sleeping with one, Richard Burton in Europe. In the Taylor case it was entirely unforeseeable that the defendant's acts in Europe would yield results in Oregon. It was entirely

unreasonable to assume that while Miss Taylor and Mr. Burton were connubially engaged in various activities in Europe, they should have thought of the effects those activities would have on some motion picture theatre owner in Oregon.

Where forum consequences are foreseeable, in personam jurisdiction may be constitutionally asserted. Only where the forum consequences are not foreseeable, can there be any constitutional question.

In the case at bar, if we were to apply the test enunciated in Hanson v. Denckla, supra, it is clear that Cosmic took advantage of the benefits and protections of the laws of Bangladesh. Had the jute mills in question failed to honor their agreements with Cosmic, there is little doubt that Cosmic could have brought suit against those jute mills in the Bangladesh courts for the damages it sustained.

Similarly, if we were to apply the test of foreseeability of forum consequences, the constitutionality of this assertion of jurisdiction would also be sustained. It would be difficult to argue that Cosmic should not be held to reasonably foresee that its failure to pay for the goods it purchased from jute mills in Bangladesh would affect the creditors in Bangladesh.

There is little doubt of the constitutionality under our concept of due process of the assertion of jurisdiction by the Bangladesh Courts in these causes of action against Cosmic.

Therefore, the sovereign nation of Bangladesh has jurisdiction which is consistent with our concepts of due process. The claims against Cosmic were therefore located in Bangladesh within the meaning of the Act of State Doctrine and the Courts here are precluded from questioning the validity of the taking.

On Page 18 of its decision herein (A. 36) the District Court cited Harris v. Balk, 198 U.S. 215, 49 L.Ed. 1023, 25 S.Ct. 625 (1904) as authority for the proposition that a debt is located wherever the debtor is. We submit, however, that the Harris case like Republic of Iraq and Menendez, is authority for the proposition that a debt is located wherever it may be enforced. In New York, such esoteric intangibles as the obligation of an insurance company to reimburse its insured for any damages collectible against the insured and to defend the insured are deemed to be located within New York for purposes of attachment if the insurance company is amenable to jurisdiction. Seider v. Roth, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312; Simpson v. Loehmann, 21 N.Y. 2d 305, 287 N.Y.S. 2d 633.

Since the Courts of Bangladesh have the powers to enforce the debts of Cosmic involved in this litigation, those debts have a situs in Bangladesh and were subject to the Act of State Doctrine. These debts have a situs in Bangladesh also because the proceeds were already mortgaged or charged by Amin and Nishat in Bangladesh.

(C) THE DEBT OF COSMIC WAS LOCATED IN BANGLADESH AS AN INCIDENT TO THE SECURED DEBT BETWEEN THE JUTE MILLS AND THE BANKS WHICH WAS ITSELF LOCATED IN BANGLADESH.

In both cases, Amin Jute Mills Ltd. and Nishat Jute Mills, Ltd. owed the banks substantially in excess of the amounts involved. These jute mills were undoubtedly within Bangladesh at the time of the Expropriation Decrees. There can be no question as to the power of the Bangladesh Courts to enforce the debts of these jute mills to the banks. Therefore, under the Act of State Doctrine, this Court cannot refuse to recognize that the new banks created under the Bangladesh Banks Nationalisation Act of 1972 became the owner of the debts from the jute mills to the banks.

We submit that the assets which secured the indebtedness of the Jute Mills to the Banks also passed as an incident of that taking. In Stillman v. Northrup, 109 N.Y. 473 (1888), the Court

held that the transfer of a debt carried with it as incident thereto the securities for the payment of that debt. Also see Brainerd, Sholer and Hall Quarry Co. v. Brice, 250 U.S. 229, 63 L.Ed. 951, 39 S. Ct. 458 (1919). Therefore, the nationalization by Bangladesh of the indebtedness of the jute mill to the bank carried with it a nationalization of the security given to the bank to insure the payment of that debt. The debt cannot be separated from the security and the security cannot be detached from the debt. If one was nationalized by the Bangladesh Banks Nationalization Order of 1972, the other must necessarily follow. If the debt of Amin to UBL and the debt of Nishat to National Bank of Pakistan were nationalized by the Banks Nationalization Order of 1972, the security given to insure the repayment of those debts also went with that nationalization. Therefore, the debt of Cosmic to the Bank in question passed to the newly created banks under the Bangladesh Banks Nationalization Order of 1972 as an incident of the taking of the indebtedness of the jute mills to the banks whose assets were in fact nationalized. Accordingly, the Act of State Doctrine should be applied and the Court is precluded from determining the validity of this taking by Bangladesh.

(D) THE CLASSIC DESCRIPTION OF THE ACT OF STATE DOCTRINE OUGHT TO BE AMENDED.

Judge Brieant noted in his decision that the classic statement of the Act of State Doctrine is contained in Underhill v. Hernandez, supra, as follows:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." (A. 21).

We submit, however, that the statement in Underhill vs. Hernandez did not contemplate what would happen in the event of the taking by a foreign government of an intangible such as a debt involved in this case. Adherence to that classic remark has caused the courts to engage in mental gymnastics throughout the years in an effort to locate the thing that was taken. If the thing that was taken was located within the taking state, then the Act of State Doctrine would apply under the classic statement. On the other hand, if the thing that was taken was not located within the taking state, then the courts would conclude that the Act of State Doctrine did not apply and some determination would have to be made as to the validity of the taking.

We submit, however, that there are some things which can be taken which cannot be located, such as intangibles. Debts, such as are involved in these actions, are intangibles. We can continue

to engage in the same mental gymnastics that the courts have done in the past and try to locate an intangible such as the debts involved in these actions or we can recognize the practical realities of the situation and say that a debt literally cannot be located.

Being an intangible, a debt cannot be seen, heard, smelled or felt. It requires an unusual feat of judicial extra-sensory perception to locate a debt. We would submit that the classic statement in Underhill vs. Hernandez that the Courts of the United States will not sit in judgment on the acts of the government of a foreign state should be amended to read that our courts will not sit in judgment of the taking of tangible personal property or real property by a foreign state within its own territory or the taking of any intangible property by a foreign state where that foreign state has a reasonable relationship to that taking. Such a restatement of the Act of State Doctrine would give meaning to the theory and obviate the necessity that the courts and counsel engage in mental gymnastics to locate intangibles.

We also believe that a reasonable relationship to the taking involving a debt would be when the taking state has the creditor before it. For as we have shown above in this brief, it is only the creditor, not the debtor who is being deprived of his property when a debt is taken.

While the law of the Act of State Doctrine is not yet as stated in this portion of the brief there is no reason why the law should not be so. Applying the realities of the situation, there is no reason why a state which takes a debt of a creditor located within its territory should be subjected to judicial review when a state which takes a tangible piece of property is not.

We submit, then, that we ought not to rely upon a statement made in Underhill vs. Hernandez in 1897 merely because it was said then. If that statement ought to be modified, there is no time like the present for doing so.

(E) THE HICKENLOOPER AMENDMENT IS INAPPLICABLE.

Although it was not argued below that there is any application to be made of the so-called Hickenlooper Amendment, we feel it is necessary to briefly state the reasons why that Amendment is inapplicable.

This amendment was originally a rider to that Foreign Assistance Act, and was originally effective only for cases commenced prior to January 1, 1966.[10] It was later modified and made permanent legislation in the Foreign Assistance Act of 1965.[11]

---

[10] 78 Stat. 1009, 1013 (1964).

[11] 79 Stat. 653.

In its present form it is located at 22 U.S.C. 2370, paragraph (e) (2)[12].

This curious bit of legislation states that a Court in certain instances shall not decline to make a determination on the merits giving effect to the principles of international law. The section, however, is not applicable to "any case in which an act of the foreign state is not contrary to international law". This double negative in effect means that if a state acts in accordance with international law, whatever that may be, the courts have no business determining the validity of that act. Our notions of law are not necessarily the same as the notions of law in other countries. In many countries throughout the world, and indeed in most countries, the law is whatever the person having the largest stick, gun, cannon, bomb, or missile, says the law is. In international law, might makes right. There is no such thing in international law as jus naturale. The fact that the nations of the world cannot agree on the right

12 (2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

of a sovereign nation to take property of aliens has been noted by the Supreme Court of the United States.

In Sabbatino the Court said: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens". (376 U.S. at p. 428). In Mr. Justice Brennan's opinion in First National City Bank v. Banco Nacional de Cuba, supra, he stated that in Sabbatino, "Mr. Justice Harlan noted the lack of consensus among the nations of the world on the power of a state to take alien property ...". Although Mr. Justice Brennan referred to a lack of consensus on the power of a state to take alien property, there is little doubt that a state has such power to take whatever property it wants within its territory. The lack of consensus that exists is on the right of a state to take alien property. Obviously, there exists no unanimity among the nations of the world on the right of a state to nationalize foreign owned property without just compensation.[13]

---

[13] See discussion of United Nations General Assembly Resolution of December 21, 1952, 23 Department of State Bulletin 996 (1952) re. jurisdictional developments in sovereign immunity and foreign confiscations, 1 New York Law Forum, page 160 (June 1955).

Additionally, it should be noted that when the Supreme Court granted certiorari in the Menendez Case, it did not request counsel to brief the application of the Hickenlooper Amendment to the facts in that case. Obviously, the Supreme Court felt that the act of Cuba in "interventing" the cigar factories was not a violation of international law. Similarly the act of Bangladesh in nationalizing its banks was no violation of international law.

Both Pakistan and Bangladesh constitutionally permit their Governments to take property of private individuals without the payment of adequate or prompt compensation.[14]

Under these circumstances, it cannot be said that what was done by Bangladesh was a violation of international law. The Hickenlooper Amendment only seeks to compel the Courts not to invoke the Act of State Doctrine where there is a violation of international law. Therefore, the Hickenlooper Amendment does not obviate the necessity for the Court to give effect to the Act of State Doctrine in the case at bar.

---

[14] See Constitutional provisions in UBL Stipulation, paragraphs 23 and 24, and in Sonali Bank Stipulation, paragraphs 65 and 66. (A. 56; A. 153; A. 154).

In addition, the Hickenlooper Amendment is not applicable to a taking of a contract claim. The New York State Court of Appeals held in French v. Banco Nacional de Cuba, 23 N.Y. 2d 46, 295 N.Y.S. 2d 433 (1968), that the statute does not apply to the taking of a contract right. As the Court pointed out in the French Case, in its original form the Hickenlooper Amendment referred to cases in which "a claim of title or other right is asserted..." (Emphasis supplied.)

Congress later modified that Amendment to a claim of title or other right to property is asserted...". (Emphasis supplied.) The addition of the words "to property" by the Congress implied that the Hickenlooper Amendment cannot apply to an intangible such as a contract claim but could only apply to a tangible "property".

In Menendez v. Saks & Company, supra, this Court wrote at page 1372:

> "Judge (then Chief Judge) Lumbard, after an exhaustive analysis of the amendment's legislative history, concluded that it was intended to be limited to cases involving claims of title with respect to American-owned property nationalized by a foreign government in violation of principles of international law. For instance, the amendment might be invoked by an American firm if an effort should be made to market the product of such an expropriation in the United States. Further support for this interpretation of the Hickenlooper Amendment is found in French v. Banco Nacional de Cuba, 23 N.Y. 2d 46, 295 N.Y.S. 2d 433, 242 N.E. 2d 704 (1968) where the New York Court of

> Appeals held that a claim for breach of contract is not a 'claim of title or other right to property' within the meaning of the Hickenlooper Amendment and that the repudiation of a contractual obligation does not amount to a 'confiscation or other taking' as those terms are used in the statute. Despite Judge Keating's vigorous disagreement with the first of these holdings we are persuaded by the legislative history, and particularly by Congress' insertion in 1965 of the words 'to property' immediately after the phrase 'claim of title or other right', that the intent was to exclude all contract claims from the amendment." (Footnote omitted.)

Obviously, then, this Court has agreed with Judge Fuld's reasoning in the French Case and has disagreed with Judge Keating's dissent therein.

In addition, another reason exists why the Hickenlooper Amendment is not applicable. The history of that legislation indicates that the rights sought to be protected by the enactment of the Hickenlooper Amendment were those of Americans and not foreigners.

In his testimony before the House Committee on Foreign Affairs, the then Attorney General of the United States, Mr. Katzenbach, stated that the amendment dealt with a "very isolated, infrequent occurrence...when the American property that has been nationalized...finds its way back in the United States". French v. Banco Nacional de Cuba, supra, footnote 11.

In the case at bar there was no American property that has been nationalized or taken. It is Pakistani property that was taken if there was any taking at all. Furthermore, it should be noted that in Menendez, supra, this Court approved Judge Lumbard's analysis that the Hickenlooper Amendment was "intended to be limited to cases involving claims of title with respect to American owned property".

CONCLUSION TO POINT II.

The Act of State Doctrine precludes the Court from looking into the validity of any "taking" of a property by a sovereign nation. To the extent that the claims involved in these actions involve property taken from the pre-existing banks and vested in the newly formed banks by the Bangladesh Banks Nationalisation Order of 1972, there has been a "taking" within the meaning of the Act of State Doctrine.

We have shown that the debt that was taken was located within Bangladesh. This is because either the debt of Cosmic is enforceable in Bangladesh, or because a debt is located where the creditor is or because that debt passed by reason of the taking of the debt of the jute mill to the Bank as an incident to that taking. Furthermore, we believe

we have given the Court additional grounds for expansion on the traditional notion of the Act of State Doctrine and its classic statement in Underhill vs. Hernandez.

If ever there arose a case in which the Court should apply the Act of State Doctrine, and not apply American law to determine the validity of an act of a foreign government, it was these cases. Both Pakistan and Bangladesh have expressly renounced the concept of due process of law as interpreted under our Constitution, which we hold so dear. (A. 56; A. 153; A. 154). For the Courts to attempt to impose our concept of due process on nations and their nationals which have expressly renounced those principles would be an unwarranted invasion by the Judiciary into the sphere of foreign relations where the Courts ought not to be.

Our Constitution has expressly given the power to conduct the foreign affairs of our nation to the so-called "political" arms of government, i.e. the Executive and Legislative arms. From the inception of our Republic, the Courts have steadfastly refused to involve themselves in the orbit of foreign relations of our government where such involvement may embarrass the Executive. A failure to recognize

the laws of a friendly sovereign or to subject those laws to the scrutiny of our unique concept of due process, will undoubtedly be a source of embarrassment to our country in the conduct of its foreign relations.

Under the doctrine of sovereign immunity, the Court is precluded from examining into the validity of the vesting of title to these claims in Janata Bank and Sonali Bank, respectively.

POINT III.

IF THE ACT OF STATE DOCTRINE IS INAPPLICABLE THE COURT MUST THEN DETERMINE THE VALIDITY OF THE TAKING BY BANGLADESH. THE DETERMINATION OF THAT VALIDITY SHOULD NOT BE MADE ON THE BASIS OF AMERICAN LAW.

If the Act of State Doctrine does not apply, the Courts must then determine the validity of the "taking" by Bangladesh. The question then resolves itself to under whose law should the Court determine whether the "taking" was valid. Obviously, under Bangladesh law, the taking was valid. Under the Constitution of Pakistan, Pakistani law would also consider this taking to be valid if the taking had been done by Pakistan itself, rather than a successor to Pakistan in the territory, namely, Bangladesh.

The Pakistani plaintiffs, however, would have the Court apply neither Pakistani nor Bangladesh law to this dispute between nationalized agencies of these respective governments.[15] The Pakistani plaintiffs have opted for a choice of American law, claiming that the applicable law on the Indian subcontinent is repugnant to our moral sense of values.[16]

The emergency of Bangladesh as a sovereign nation is a fact which cannot be ignored by this Court. Prior to the separation of the old Pakistani territory into two nations, the banks in that territory operated under a system by which each branch office had its own assets and liabilities. The monies deposited in a particular branch were repayable from that branch, and loans made by a particular branch were repayable to that particular branch. Prince v. Oriental Bank Corporation, referred to by Mr. Haider Mota, a witness on behalf of the Pakistani plaintiffs, supports that conclusion.

That proposition is also supported by the case of Arab Bank v. Barclays Bank, supra. It is also a principle of international law that a debt is situated where the elements of contract out of which the obligation to pay arose are most densely grouped.

---

[15] The Court is requested to take judicial note of the fact that Pakistan has also nationalized all banks in its territory. See New York Times, January 6, 1974, p. 8. Although the issue is not before the Court, counsel has been informed that Bengali citizens have not yet received any compensation for that taking. See Federal Rules of Evidence, Rule 201.

[16] It is not clear that under American law the nation of Bangladesh is guilty of an international tort by taking these claims from the pre-existing banks created under the Bangladesh Banks National.sation Order. Dreyfus v. van Finck, 73 Civ. 5271-CLB.

By the emergence of Bangladesh as a sovereign nation, and its recognition by the United States of America and by Pakistan, as such, the branches of the old banks have necessarily been severed from their heads by the intervening succession of newly acquired statehood. The separation did not occur because of any "taking" by the Government of Bangladesh. It occurred because a new international boundary arose which precluded the banks from acting as tentacles of one organism.

Having been so separated by act of international law such as the emergency of a new geographical boundary, each bank then severed was entitled to its own assets as maintained on the books of the branches, and was obligated to its own liabilities.

Yet, in these cases, the heads of UBL and National Bank of Pakistan claim that they are entitled to the assets acquired from the jute mills in question, while disdaining any obligation to repay their former branches for the advances made by these former branches to these very jute mills.

In determining a dispute between foreign nations of two nations, both of which have expressly rejected the law of the United States, it must be remembered that just as much as American policy may abhor the law in effect in those nations which allow the taking of property without the payment of prompt or adequate compensation, those nations similarly abhor

American law which requires such prompt payment of adequate compensation. In the instant case, both governments have expressly renounced that concept, and both governments, through their nationalized banking institutions, have made claims to the monies due and owing by Cosmic.

We submit then, that American law ought not to be applied to this dispute, and that the law generally applicable in the territory from which all of the claimants to these disputes come, should be applied.

POINT IV.

EVEN IF THIS COURT WERE TO DETERMINE THE VALIDITY OF THE TAKING BY BANGLADESH IN ACCORDANCE WITH AMERICAN LAW, THAT TAKING WOULD BE DEEMED VALID.

On the ninth page of its Opinion, the District Court held that "there is no question that such an expropriation is 'offensive to the public policy of this country and its constituent states'. Banco National, supra, at 436. New York Courts are in accord on this point; see Perutz v. Bohemian Discount Bank in Liquidation, 304 N.Y. 533 (1953); Vladikavkazsky Ry. Co. v. New York Trust Co., 263 N.Y. 369 (1934); Gonzales v. Industrial Bank (of Cuba) 12 N.Y. 2d 33, 234 N.Y.S. 2d 210 (1962)".

We believe that the Court below erred in this respect.

Not every taking by a foreign Government violates our public policy and the law of the constituent states of the United States. Exceptional circumstances sometimes do result in enforcement, even in the State of New York, of foreign expropriation decrees. See e.g., Anderson v. N. S. Transandine, 289 N.Y. 9, 43 N.E. 2d 502 (1942). In this case, we believe that we have those circumstances which would make the confiscation of Pakistani property by Bangladesh consistent with our public policy.

In the determination of these disputes between two sovereigns, neither of whom recognize our concept of due process, we should not rush to haughtily impose those notions of due process upon these two sovereigns who have expressly rejected it on the theory that that notion precludes the taking of enemy property during wartime. Indeed, in every declared war from the birth of our nation almost two hundred years ago to the present, we have recognized the right of the Government to seize the property of enemies during wartime irrespective of the Due Process Clause of our Constitution. Only a Treaty of Peace could prevent the taking of enemy property. See War v. Hylton, 3 U.S. (3 Dallas) 199 (1797) 1 L. Ed. 568 (Revolutionary War);

Miller v. United States, 78 U.S. (11 Wall.) 268, 20 L.Ed. 135 (1871) (Civil War); Stoehr v. Wallace, 255 U.S. 239, 65 L.Ed. 604, 41 S.Ct. 293 (1921) (World War I); Cities Service Co. v. McGrath, 342 U.S. 330, 96 L.Ed. 359, 72 S.Ct. 334 (1952) (World War II). Confiscations have even included assets of foreign banks owned by enemy aliens. Cummings v. Deutsche Bank, 300 U.S. 115, 81 L.Ed 545, 57 S. Ct. 359 (1937).

The taking of enemy property without the payment of compensation is permissible even in the United States as a lawful incident of the Congress' power to make war under Article I, Section 8 of our Constitution. As the Court observed in Ware v. Hylton, supra:

> "[E]very nation at war with another is justifiable, by general and strict law of nations, to seize and confiscate all moveable property of its enemy (of any kind or nature whatsoever), wherever found, whether within its territory or not."

Thus, what the Court below found to be repugnant to our public policy when done by Bangladesh is precisely what our country has been doing since its inception. If Pakistan was at war with Bangladesh, as is undoubtedly the

case, then Bangladesh had the right to seize Pakistani property and no such seizure should violate the morals or principles of our American law. We would be most hypocritical if we were to impose duties upon Bangladesh that we do not follow ourselves. The argument that we should impose such a hypocritical point of view on Bangladesh is even more illogical when the thing that we are trying to impose on Bangladesh is a method of how to conduct a war for its very survival.

For these reasons, even if American law were to be used as the basis for the determination of the validity of the taking by Bangladesh of these claims, the Court would have to find that such a taking was valid.

CONCLUSION.

In the next to the last page of its opinion (A. 38) the District Judge quoted from our brief to him. In the conclusion of that brief below, we pointed out that it was the product of the toil of the Bangali workers which was sold to Cosmic International, Inc. and for which payment is being requested and requested that these people who created that

product be granted such payment. We did not ask the Court to "act as an almoner with the funds of others, nor overlook 'the policy of the United States ... that there is no such thing as a 'good' confiscation by legislative or executive decree.' Republic of Iraq, supra, at 52."

The products in question, i.e., the jute, belonged to the Bengalis and the Court should find that the funds received therefrom should also belong to them. Furthermore, Amin and Nishat in Bangladesh are debtors to the banks in Bangladesh. In addition, Cosmic should have its debt discharged to the real creditors which in these cases can be no others than the plaintiffs from Bangladesh. We submit that the Court's approach should be one to locate the creditor rather than to locate the debt and if the Court adopts this view, it will be found that the creditor is in Bangladesh.

We do not request sympathy from the Court but merely understanding and consideration based upon legal principles and justice set forth in this Brief. We submit that the judgments entered in both of these cases below should be reversed and the sums awarded below to the claimants

from Pakistan should be awarded to the claimants from Bangladesh.

Respectfully submitted,

NIERENBERG, ZEIF & WEINSTEIN

By: _____
A Member of the Firm
Attorneys for Appellants
Janata Bank and Amin Jute Mills, Ltd.
and Sonali Bank and Nishat Jute
Mills, Ltd.
230 Park Avenue
New York, N.Y. 10017
Telephone: (212) OR-9-1455.